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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-980

M. M. POWELL,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

SAM SEXTON, JR.
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INDEX

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 3

Summary of Record 5

Argument 6

Opinion of the Supreme Court of Arkansas 9

Appendix 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ...X....

M. M. POWELL,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

OPINION BELOW

Petitioner seeks a review of the decision of tht Supreme Court of Arkansas in Cause No. 5592, entitled M. M. Powell, Appellant v. State of Arkansas, Appellee, said opinion delivered September 27, 1971, and reported at 251 Ark. 46, 471 SW2d, 333. A copy of the opinion is appended hereto. The Supreme Court of Arkansas, by per curiam order of November 1, 1971, denied petition for re-hearing.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USCA Sec. 1257 (3).

QUESTION PRESENTED

Petitioner was convicted before the Circuit Court Polk County, Arkansas, of Grand Larceny. He appealed to the Supreme Court of Arkansas, the highest court of that jurisdiction, one of the questions presented upon appeal being:

> The prosecuting attorney denied to the Defendant a fair trial by commenting on the Defendant not taking the stand.

The question was raised by proper objection during trial, and Motion for mis-trial, motion for New Trial, and raised by assignment of error in the appeal before the Supreme Court of Arkansas. Such error was properly raised and preserved throughout the proceedings.

The assigned error is in violation of USCA Constitution, Amendment V, which provides, in part:

> ". . . Nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

which prohibitions represent fundamental ideals in the constitutional heritage and apply to the state through USCA Constitution, Amendment XIV.

STATEMENT OF THE CASE

M. M. Powell was convicted of Grand Larceny in the Circuit Court of Polk County, Arkansas, and sentenced to eight (8) years in the Arkansas State Penitentiary.

I

The facts giving rise to the charge and conviction are these. Richard P. Daniels, an investigator for the Alcohol, Tobacco and Firearms Department of the United States Department of Treasury instituted an investigation into the possible sale of stolen firearms in October of 1969. This investigation eventually led Mr. Daniels and an array of Federal and State law enforcement officers to the city of Mena, Arkansas, on December 19, 1969.

The State contends that on December 19, Mr. Daniels and a Mr. Jones arrived at Abby's Cafe in Mena at approximately 1:00 o'clock in the afternoon, where Mr. Daniels was to purchase a quantity of firearms for a pre-set amount of $22,659.00. At Abby's Cafe, Mr. Daniels met a Mr. Peter C. Mavrikis and Carl Wayne Matthews. After Mr. Mavrikis satisfied himself that Mr. Daniels was not a Federal Officer, he sent Mr. Matthews to Mena. Mr. Matthews later returned to Abby's, in the same automobile in which he departed, with M. M. Powell, the defendant herein. A conversation ensued between Mavrikis, Matthews, Powell and Daniels. During the course of the conversation Mr. Powell put the $23,000.00 Mr. Daniels had with him in a bank bag, and gave Mr. Daniels $350.00 in change. Mr. Powell gave the bag to Mr. Daniels, but

by this time, Mr. Daniels was suspicious. When another man approached the automobile, Mr. Daniels jumped out, and informed the other law enforcement officers, by radio he had in his boot, that there had been a heist and for them to get Matthews and Powell who had driven off in their automobile.

Meanwhile, Mr. Daniels obtained a knife, cut the bag open and found only play, paper money.

In response to Mr. Daniels signal an airplane belonging to the Arkansas State Police followed the car until other agents stopped and apprehended Mr. Powell.

Subsequently, Mr. Powell was charged, by way of Information, with the crime of Robbery. In a Bill of Particulars, the State attempted to amend its information, and charged Mr. Powell with the crime of Larceny. On October 26, 1970, Mr. Powell was tried and convicted of Grand Larceny and was sentenced, by the Court, to eight (8) years in the Arkansas State Penitentiary.

SUMMARY OF RECORD

Portions of the summary of the record of proceedings relating to the improper comments of the prosecuting attorney upon the failure of the Defendant to testify at the trial appear in the *appendix* annexed hereto.

Those portions of the record of proceedings which appear in the *appendix* specify the stage in the proceedings before the trial court at which, and the manner in which, the federal questions sought to be reviewed were raised, the way in which they were passed upon by the Court, and contain such specific quotations of portions of the record or summary thereof as will show that the federal question was timely and properly raised to give this Court jurisdiction to review the judgment.

All objections and motions were timely made. Upon their being overruled or denied, exceptions were properly taken and such errors were preserved by the Motion for New Trial contained in the *appendix*. The abstract of proceedings filed in the appeal to the Supreme Court of Arkansas included the material contained in the *appendix* annexed hereto, and the question presented for determination to the Supreme Court of Arkansas was couched in the exact terms of the question presented for review upon certiorari herein.

ARGUMENT

A Prosecuting Attorney does not have the right to comment on an accused's taking, or not taking, the witness stand either in opening arguments, during the course of trial, or in his summation. Fifth Amendment to the Constitution of the United States; Article 2, Section 8 of the Constitution of the State of Arkansas; *Perry v. State,* 188 Ark. 133, 64 S.W.2d 328 (1933); *Evans, et al v. State,* 221 Ark. 793, 255 S.W.2d 967 (1953); *Griffin v. State of California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).

In the case at bar, a witness for the State, was on valid cross-examination by Mr. Foreman when the prosecutor made his comment. The prosecutor had the right of redirect or the opportunity to call other witnesses to clarify any point Mr. Foreman may have made on cross-examination. His comment that ". . . . surely the defendant can testify in person and by personal knowledge" (T-299) was uninvited and greatly prejudicial to the Appellant's right to a fair and impartial trial by a jury of his peers.

Neither does the Prosecuting Attorney have the right to comment on the accused's silence. *Griffin v. State of California, supra.* Justice Byrd, in his dissenting opinion in the case of *Shaddox v. State,* 244 Ark. 747, 427 S.W.2d 198 (1968) recognized the evil of this grave situation when he stated:

> "What the jury may infer on its own from the defendant's failure to take the witness

> stand is one thing, but what it may infer when the prosecutor argues his silence as evidence is quite another. The former is a necessary evil following from accuseds presence at the trial, but the latter is forbidden by the Fifth Amendment to the United States Constitution."

There was not just one comment on the defendant's silence, but three such comments. (T-578 and T-579). These were made after drawing the jury's attention to the fact that the defendant could testify in person and by personal knowledge, (T-299) which was not cured by the trial court's charge to the jury. (T-305 and 306).

In *Stout v. State,* 246 Ark. 470, 438 S.W.2d (1969), Chief Justice Harris and Justices Byrd and Holt recognized that repeated comments made by the State's Attorney could well impress the jury with fact that there was some reason why Appellant did not testify, citing the *Perry* case, supra. The prosecutor's comments were repeated and cumulative in their prejudicial effect upon the jury. The prejudice, and we re-emphasize, is shown when the Jury's foreman, in speaking for the entire jury, asked: "Why wasn't Powell brought on the stand?" (T-629)

Petitioner submits that the comments of the prosecutor during the trial, repeatedly calling to the attention of the jury that petitioner did not testify, violates his privileges and rights guaranteed him by the V, VI and XVIII amendments and that certiorari should be granted to correct this infringement upon the rights and privileges of the

petitioner to the end that he may have a trial fairly conducted within Constitutional bounds.

Respectfully submitted,

SAM SEXTON, JR.
P. O. Box 1526
Fort Smith, Ark. 72901

OPINION OF SUPREME COURT OF ARKANSAS

M. M. POWELL, Appellant

v.

STATE OF ARKANSAS, Appellee.

No. 5592

Supreme Court of Arkansas

SEPT. 27, 1971

REHEARING DENIED NOV. 1, 1971

AFFIRMED.

Fogleman, J., filed concurring opinion.

BYRD, Justice.

Appellant M. M. Powell, for reversal of his grand larceny conviction, alleges:

"1. The Court erred in overruling defendant's demurrer to the information in that the information or Bill of Particulars contained no allegation of ownership of property allegedly stolen.

2. The prosecuting attorney denied to the defendant a fair trial by commenting on the defendant's not taking the stand.

3. The evidence is not sufficient to support the verdict."

The record shows that the information and bench warrant charging appellant with robbery were filed on December 19, 1969. On January 22,

1970, appellant filed a motion for Bill of Particulars and on the same date asked that his motion for Bill of Particulars be withdrawn, waived formal arraignment and entered a plea of not guilty. On January 29, 1970, the state filed a Bill of Particulars which, among other things, provided:

"1. The State of Arkansas contends that Richard Daniels was robbed both by force and intimidation. The State of Arkansas also contends that the lesser offense of Grand Larceny is included in the charge made against the Defendant herein, and the State of Arkansas requests permission and leave of the Court that the information filed herein be amended to state in the body thereof, as follows: The said Defendant, on the 19th day of December, 1969, did unlawfully and feloniously take, steal and carry away from Richard Daniels cash money in the amount of $22,650.00, against the peace and dignity of the State of Arkansas."

The case was originally set for trial at 9:00 A.M. on February 16, 1970. At 8:50 A.M., appellant filed a petition in Federal Court, which delayed trial until Oct. 26, 1970, on which date he filed his "Demurrer-Exception and Second Motion to Quash Information." In that plea of abatement, appellant alleged, among other things:

"Comes, now, Marshall Mays Powell, Defendant, and files his second Motion to Quash the information and demurs and excepts to said information for the following reasons:

* * * * * *

"II. * * * (3) It fails to allege the ownership of said monies to be then and there the corporeal personal property of the said Richard Daniels; nor ownership of that of any other person, the name or names of the owners of said money.

"(Thus, the attorneys for this case cannot properly interrogate and exercise challenges of the prospective jurors, who might have any affiliation with owners of said money.)

"(4) Said information (and/or Bill of Particulars if the Court should hold that this case is a prosecution thereon) does not set forth with particularity allegations sufficient to apprise this Defendant of the nature of the charge against him, and, as a part of this demurrer-exception and motion to quash, this Defendant here—now requests an amended Bill of Particulars so that he may properly prepare his defense. (27 Am. Jurisprudence) * * *

* * * * * *

"WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Demurrer-Exception and Second Motion to Quash Information be in all things sustained, and that this prosecution be abated and dismissed from the docket of this Court"

The proof adduced by the State showed that Richard P. Daniels was a special investigator with the Alcohol, Tobacco and Firearms Division of the U. S. Treasury Department. In that capacity he was to purchase some stolen firearms allegedly transported in interstate commerce. Pursuant to

some previous contacts he went to Mena, Arkansas, where he met Carl Wayne Matthews and Peter Mavrikis at Abby's Cafe. On his person he had $23,000, part of which was his own funds, part was Federal funds and the remainder was furnished by the Arkansas State Police — the latter money having been handed to him by Marion Burton, the Executive Secretary to Governor Rockefeller. After Mavrikis decided that Daniels and his helper, Floyd Jones, were not federal agents, Matthews drove off in a blue and white '69 Oldsmobile toward Mena and returned with appellant. Daniels got into the Oldsmobile with Matthews and appellant. Appellant then told Daniels that they were ready to do business if Daniels had the money. At this point Daniels got the money from his automobile and returned to the Oldsmobile and got into the back seat. Appellant then indicated that he wanted Daniels to give the money to him. Appellant refused to get in the back seat with Daniels to count the money and at his insistence Daniels handed the money to appellant in the front seat. In so doing appellant told Daniels that he would count the money and hand it back. Appellant after counting the $23,000, handed $350 back to Daniels and began putting the remainder of the money into a canvas bag. When Daniels objected the car jerked and Matthews pushed Daniels back and held his hand under a newspaper in such way that Daniels thought he had a gun. About this time appellant pitched a locked canvas money bag back to Daniels and suggested that the deal was off. Daniels then jumped out of the car and asked Jones if he had a pocket knife. When Jones stated

that he did not, Daniels told Jones to stay there while he went after a knife. At this time appellant and Matthews drove away. Inside Abby's Cafe, Daniels cut the bag open and determined that it contained only play money. He then notified the other officers by radio that appellant and Matthews had the money. Appellant was arrested about two miles away and the money was recovered.

S. Perry Penland, a Florida lawyer, testified to a prior transaction between him and appellant whereby appellant absconded with $140,000 through the use of a canvas bag under similar circumstances.

[1, 2] POINT I. We find no merit in appellant's contention that the trial court erred in overruling his demurrer to the information. As we read the Bill of Particulars, it alleges that appellant stole the money from the possession of Richard Daniels. The authorities generally support the proposition that ownership may be laid either in the real owner or in the person in whose possession the property was at the time of the theft. See *State v. Esmond*, 135 Ark. 168, 204 S.W. 210 (1918); *Cook v. State*, 80 Ark. 495, 97 S.W. 683 (1906), and 50 Am.Jur.2d Larceny § 132. Thus the charge as made was sufficient against appellant's plea in abatement.

POINT II. One thrust of appellant's argument that the prosecution denied him a fair trial by commenting on his failure to take the witness stand arose during cross examination of Daniels in this manner:

"Q. (Cont'd. by Mr. Foreman) Did you personally investigate whether or not on the following Sunday afternoon and/or Monday morning, the exact list of guns that were read off into this record from your statement awhile ago were changed from one truck to another at Y-City?

MR. HARDEGREE:

Your Honor, I object.

THE COURT:

What is the purpose of it, please, Mr. Foreman?

MR. FOREMAN:

To bear out the defense's statement to the jury that the guns were here, and were to be delivered, and that my client was simply a broker to watch the money and see that the owners of the guns got it.

MR. HARDEGREE:

Now, your Honor, to which the State says that surely the defendant can testify in person and by personal knowledge.

THE COURT:

If he has any personal knowledge of this, I will let him so testify. I don't want him to testify to any hearsay.

MR. FOREMAN:

May we adjourn for a record, Your Honor?

THE COURT:

To do further than the record that has already been made?

MR. FOREMAN:

Yes, sir, I ask that either the jury be retired, or that we retire with the court reporter.

THE COURT:

If you desire, we will go in chambers. I feel I have ruled on it unless —

MR. FOREMAN:

I know you have ruled on it. I just want to make a record on it. I'm not going to argue with the Court.

(At this point, the Court, counsel and the court reporter retired into chambers out of the hearing of the jury, and the following proceedings were had:)

IN CHAMBERS:

MR. FOREMAN:

Comes the defendant, Marshall Mays Powell, and moves for a mistrial because of the conduct of the Prosecuting Attorney, Joe Hardegree, in commenting that the defendant could testify if he wanted to, * * *"

After a hearing in chambers on the motion for a mistrial the Court returned to the court room where the following occurred:

"THE COURT:

Members of the jury, do any of you remember — and I will ask you to express yourself by a show of hands — do any of you remember an objection made by Mr. Hardegree and just what he said in that objection just prior to this recess? I assume that you did

not. I think two or three of us may have been talking at once. I didn't understand it either, but if any such objection was made by Mr. Hardegree, and I am sure one was made. I remember he made an objection. I am asking you at this time to wholly and completely disregard anything Mr. Hardegree may have said in making the objection into the record. Is there anyone who couldn't do that? Thank you.

You may proceed."

Ark.Stat.Ann. § 43-1012 (Repl. 1964) provides:

"No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merit."

[3] As we read the record any error on the part of the prosecuting attorney became harmless when the trial court determined that the jurors had not even heard the remark.

[4] The appellant elected not to take the witness stand and the other remarks by the prosecuting attorney occurred during closing argument in this manner:

"You know, members of the jury, I don't mind a defense counsel at all reminding the jury that his client is just as entitled to credibility by the jury as police officers are, and it's proper and right that you be questioned as to whether or not you would give more credence to the statements of a police officer

than you would perhaps —

MR. FOREMAN:

I object to that, Your Honor.

THE COURT:

Yes, sir, I will sustain the objection. (Cont'd. by Mr. Hardegree) Thank you, Your Honor. But has the defendant, members of the jury, shown any reason why the credibility of Richard Daniels, William Sprecher, Robert Beckham, James Beech, James Lester, or any officer in this case, should be accepted at anything less than we would accept the testimony of a man who appears here, and whose credibility appears to be good.

MR. FOREMAN:

Your Honor, I ask for a mistrial.

(Cont'd. by Mr. Hardegree) What about —

THE COURT:

Members of the jury —

(Cont'd. by Mr. Hardegree) — the fact that the witness Penland's testimony stands unchallenged? Absolutely unchallenged. Mr. Penland wasn't even cross-examined. He came in and told you how this man, Marshall Powell, had run a confidence game on him in Corpus Christi, Texas, and stolen that great amount of money from him, and the facts of that case with the exception of names, brands, times and places, was exactly identical. In substance it was exactly identical to this operation here, up to the point where Daniels was handed the bag, and he knew

something was wrong. It was identical. But the witness Penland was not even challenged."

When the prosecuting attorney said that he did not mind defense counsel reminding the jury that his client was entitled to as much credibility as police officers, the court took the action requested by appellant and sustained the objection made.[1] Appellant at that time asked for no further relief. The remarks of the prosecuting attorney thereafter fall in the category of fair comment on the evidence in the record. See *Shaddox v. State*, 244 Ark. 747, 427 S.W.2d 198 (1968).

[5] In his contention that the closing argument was a comment on his failure to testify, appellant points out that the jury during its deliberation told the Court: "We have all discussed it, and all of us keep asking this question: Why wasn't Powell brought on the stand." Appellant was entitled to an instruction explaining that his failure to testify could not be considered as evidence against him, but he specifically requested that the instruction not be given. Furthermore, the jury's question could easily have been raised by his counsel's opening statement to the jury that appellant met some people at the West Memphis dog races who asked him to come to Mena to count the money they were to receive for some guns be-

[1]The record does not contain the voir dire examination of the jurors. Such questions are often propounded by counsel for defense on voir dire examination. Appellant does not contend that the statement of the Prosecuting Attorney was false.

cause they didn't trust their broker. After the State showed that the dog track was closed during the period involved, the defendant's theory that he was commissioned only to see that his principals did not get cheated by their broker left many unanswered questions.

POINT III. The evidence presented by the state is more than ample to support a verdict of guilty. In addition to the evidence recited above, another officer testified that appellant admitted in his plesence that he did not use a gun on Daniels to take the money because he thought he could talk Daniels out of the money.

Affirmed.

FOGLEMAN, J., concurs.

FOGLEMAN, Justice (concurring).

I concur in the majority opinion. I believe, however, that appellant's contentions as to Points 1 and 3 are somewhat broader in scope than would appear from the majority opinion.

In his motion for new trial, appellant asserted that there was error in the denial of his "Demurrer-Exception and Second Motion to Quash Information." As appears from the excerpt of this pleading quoted in the majority opinion, its substance made it, in the alternative, a motion for a further bill of particulars in respect to the particular deficiencies alleged in the pleading. The only such particular upon which appellant now relies was the failure to state the actual ownership of the money alleged to have been taken by him.

Our statute requires that the state, upon request of a defendant, file a bill of particulars setting out the *act or acts* upon which it relies for a conviction. Ark.Stat.Ann. § 43-1006 (Repl. 1964). This section was a part of Initiated Act No. 3 of 1936. We have recognized that the purposes of this act was to simplify procedures and eliminate technical defenses. See *Underwood v. State,* 205 Ark. 864, 171 S.W.2d 304. This act was implemented by Ark.Stat.Ann. §§ 43-804, 43-905 (Repl. 1964). See Leflar, The Criminal Procedure Reforms of 1936 — Twenty Years After, 11 Ark.Law Rev. 117, 129, et seq. This statute specifically requires that a bill of particulars "state the act relied upon by the state in sufficient details as formerly required by an indictment" and only "with sufficient certainty to apprise the defendant of the specific crime with which he is charged, in order to enable him to prepare his defense." A supplemental bill may be required only if the original one is "not sufficiently definite to apprise the defendant of the specific crime with which he is charged." Prior to the initiated act, it was only required that an indictment contain the title of the prosecution, the name of the court in which presented, the name of the parties and "a statement of the acts constituting the offense, in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended." See Crim.Code § 121, C. & M. Dig. § 3028.

It was not error on the part of the trial court to deny a request for a further bill of particulars since the information and the bill of particulars

furnished contained all the matters required by the former statute to make a good indictment by grand jury. *Brockelhurst v. State,* 195 Ark. 67, 111 S.W.2d 527; *Bryant v. State,* 208 Ark. 192, 185 S.W. 2d 280; *Bennett v. State,* 201 Ark. 237, 144 S.W. 2d 476, 131 A.L.R. 908. The *act or acts* were certainly stated in the information and bill of particulars in sufficient detail to apprise the defendant of the specific crime with which he was charged to the extent necessary to enable him to prepare his defense. *Lee v. State,* 229 Ark. 354, 315 S.W.2d 916. This is all that is required. Appellant does not actually argue that he was unable to prepare his defense. He merely asserts that, lacking the information as to the actual owner of the money, his attorneys could not properly interrogate and exercise challenges of prospective jurors who might have affiliation with such owner. This certainly is not what is contemplated as preparation of his defense in Ark.Stat.Ann. § 43-804. A reversal based upon such a construction would certainly conflict with Ark.Stat.Ann. § 43-1012 (Repl. 1964) which provides that the sufficiency of an indictment shall not be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant *on the merit.* We have held both before and after the adoption of Ark.Stat.Ann. § 43-804 that the defect must prejudice defendant's right on the merits. See *Green v. State,* 185 Ark. 1098, 51 S.W.2d 511; *Kansas City Southern Ry. Co. v. State,* 194 Ark. 80, 106 S.W.2d 163; *Underdown v. State,* 220 Ark. 834, 250 S.W.2d 411; *Edwards v. State,* 244 Ark. 1145, 429 S.W.2d 92. We have gone so far as to hold that even an

erroneous allegation as to ownership of property taken did not affect any substantial right of the defendant charged, because the offense was described with such certainty as to identfy the act so there could be no doubt about the particular offense charged. *Tucker v. State,* 194 Ark. 528, 108 S.W.2d 890. See also Ark.Stat.Ann. §§ 43-1011 and 43-1014 (Repl. 1964). While the circuit court may well have the discretion to grant a motion for such particulars as those requested by appellant, there is no reversible error in its failure to do so. *Silas v. State,* 232 Ark. 248, 337 S.W.2d 644, cert. denied, 365 U.S. 821, 81 S.Ct. 705, 5 L.Ed.2d 698.

I understand appellant's third point to be based wholly upon his contention that there was no felonious asportation. He argues that the evidence does not show that he ever had absolute possession of the money, because Daniels' control of it was never completely severed. This argument is based upon evidence that there were probably five state police officers and five federal officers in the immediate vicinity, that there was aerial observation of Daniels' meeting with Powell, and that Daniels had a walky-talky radio transmitter in his boot by which he could communicate with the plane conducting the observation and two automobiles manned by United States Treasury Department officials, one of which was at a highway intersection and another at a parking lot nearby. The other officers were alerted by radio message in a few seconds after Daniels discovered that the money had been switched. This argument seems wholly untenable to me. According to the evidence, the money was in Powell's

possession until he was arrested. During that interval Daniels' possession was totally severed, and Powell was not sufficiently under his control so that the money could be said to be in either possession or control of Daniels.

APPENDIX

Testimony of RICHARD P. DANIELS, *for the State*:

My name is Richard P. Daniels and I am 49 years old (T. 167). I am a special investigator with the Alcohol, Tobacco and Firearms part of the Treasury Department * * *.

Witness Daniels, Cross-Examination, Hon. Percy Foreman:

Q. Did you have any individuals in Mena under surveillance to determine whether or not they had possession of this contraband, these stolen guns (T. 297).

A. Nothing but hearsay. One night — I don't know whether this has any bearing on the case or not, there was a report that someone was transferring guns at Y-City, and some of the State Police made an investigation of this, and I don't know what night that was. It was after the 19th, maybe two or three days later. I don't know whether that had anything to do with this or not.

Q. This was two or three days later? Friday was the 19th, Saturday the 20th, Sunday the 21st, Monday the 22nd.

A. It would have been after that some time, I I suppose. I don't know.

Q. If it was two or three days — If it was two days, it would have been on Sunday, three days would have been Monday following the Friday, correct?

A. I suppose. (T. 298)

Q. (Cont'd by Mr. Foreman) Did you personally investigate whether or not on the following Sunday afternoon and/or Monday morning, the exact list of guns that were read off into this record from your statement awhile ago were changed from one truck to another at Y-City?

MR. HARDEGREE:
Your Honoir, I object.

THE COURT:
What is the purpose of it, please Mr. Foreman?

MR. FOREMAN:
To bear out the defense's statement to the jury that the guns were here, and were to be delivered, and that my client was simply a broker to watch the money and see that the owners of the guns got it.

MR. HARDEGREE: (Prosecuting Attorney)
Now, Your Honor, to which the State says that surely the defendant can testify in person and by personal knowledge. (T.299). (emphasis added)

THE COURT:
If he has any personal knowledge of this, I will let him so testify. I don't want him to testify to any hearsay. (emphasis added)

MR. FOREMAN:
May we adjourn for a record, Your Honor?

THE COURT:
To do further than the record that has already been made?

MR. FOREMAN:

Yes, sir, I ask that either the jury be retired, or that we retire with the court reporter.

THE COURT:

If you desire, we will go in chambers. I feel I have ruled on it unless—

MR. FOREMAN:

I know you have ruled on it I just want to make a record on it. I'm not going to argue with the Court.

(At this poin, the Court, counsel and the court reporter retired into chambers out of the hearing of the jury, and the following proceedings were had:)

IN CHAMBERS:

MR. FOREMAN:

Comes the defendant, Marshall Mays Powell, and moves for a mistrial because of the conduct of the Prosecuting Attorney, Joe Hardegree, in commenting that the defendant could testify if he wanted to, and further moves for a mistrial because of the comments (T.300) of the Court from the bench to relatively the same effect. This and these comments coming as they did are prejudicial and harmful to the rights of the defendant guaranteed by Amendment 5 to the Constitution of the United States, and the Declaration of Rights in the Constituion of the State of Arkansas, which specifically exempt a defendant from being required, give him the inalienable right not to be called on to testify, as well as to claim his exemption from testifying, and the coments by the Court and by the District

Attorney to that effect, to the effect that the defendant can testify if he wants to, even though at this stage of the trial, is a violation of these constitutional rights. The defense at this time states to the Court that they do not have any intention of offering the defendant as a witness in this case and never have had such intention, but that an invitation in the presence of the hearing of the jury from both the Prosecuting Attorney and the Court to testify accents and underlines such failure, and is calculated to so influence and prejudice the jury that an instruction not to consider the comments of the District Attorney or of the Court that the defendant can testify if he likes can not be cured, and would remain in the mind and subconcious mind of the jury notwithstanding any such instruction, and for this reason the only way to cure the harm done the constitutional right of the defendant to remain silent in the light of such invitation by the District Attorney and by the Court to the defendant to testify, or comments that the defendant can testify, is harmful and violates the rights of the defendant guaranteed by the Constitution of the State of Arkansas and by Amendment 5 to the Constitution of the United States (T.301).

THE COURT:

Are you stating into the record, Mr. Foreman, that the Court told the jury that the defendant could testify about this.

MR. FOREMAN:

In view of the record as we have it, I limit my motion for a mistrial to the remarks of

Mr. Hardegree, Your Honor (T.302).

THE COURT:

The Court will admonish the jury not to consider any statement made by the Prosecuting Attorney, and will phrase it in any fashion that will have less impact in the eyes of the defendant by merely telling the jury to completely disregard any statement having been made by the Prosecuting Attorney in objection by Mr. Foreman to the witness. Or the Court will go further, if the defendant through his counsel requests, and advise the jury the defendant either has the right to testify or decline to testify, he is exercising a constitutional right, and it certainly would be no evidence of his guilt.

* * *

MR. FOREMAN:

May it please the Court, my statement that it was incapable of being cured by instruction is renewed, and it is the considered judgement of counsel for the defendant that any instruction to that effect at this time would only accentuate the damage and harm done to the defendant by the unintentional but damaging remarks of the Prosecuting Attorney, and we do not make any request for any instruction whatever, but stand solely on our statement that the comment is, although in the beginning instead of at the end, is a comment on the failure of the defendant to testify, and we know that the Court is doing everything possible to try the case according to law, and it was in the excitement and thinking of the remarks of the District Attorney that the Court missed the word

that the witness may tesify.

THE COURT:

You mean that the defense counsel missed it (T.303)?

MR. FOREMAN:

Yes, that I missed it. In my original objection to Mr. Hardegree, I just think there isn't any way instruction can overcome the prejudice and harm done to the defendant. We do know Mr. Joe Hardegree does not and did not intend to violate any rule of evidence or constitutional right of the defendant, but the question is to be measured from the standpoint of the defendant rather than from the intention of the Prosecuting Attorney.

MR. HARDEGREE:

May I state into the record that any damage which may have been done to this defendant, and the State contends more has been done, was invited by counsel for the defendant in pursuing a line of questioning that counsel for defendant well knew was strictly and certainly hearsay, and from posing questions in such a way as to get before the jury something that could not be properly elicited from the witness. Further, the State contends that the defendant certainly is in a position to produce testimony about any such transaction that may have occurred two or three days after the 19th as was alluded to in Mr. Foreman's statement to the jury in the form of a question.

THE COURT:

The motion is overruled, and the Court will

advise the jury to disregard any remarks, if they heard a remark, made by the Prosecuting Attorney.

MR FOREMAN:

To the overruling of the motion for a mistrial, the defendant, Marshall M. Powell excepts (T.304).

* * *

STATE'S CLOSING ARGUMENT:

You know, members of the jury, I don't mind a defense counsel at all reminding the jury that *his client is just as entitled to credibility by the jury as police officers are*, and it's proper and right that you be questioned as to whether or not you would give more credence to the statements of a police officer than you would perhaps — (T.578)

MR. FOREMAN:

I object to that, Your Honor.

THE COURT:

Yes, sir, I will sustain the objection. (Cont'd. by Mr. Hardegree) Thank you, Your Honor. But *has the defendant*, members of the jury, *shown any reason why the credibility of* Richard Daniels, William Sprecher, Robert Beckham, James Beech, James Lester, or *any officer in this case, should be accepted at anything less than we would accept the testimony of any man who appears here*, and whose credibility appears to be good. (emphasis added)

MR. FOREMAN:

Your Honor, I ask for a mistrial.

(Cont'd. by Mr. Hardegree) What about—

THE COURT:

Members of the jury—

(Cont'd. by Mr. Hardegree)—The fact that *the witness Penland's testimony stands unchallenged? Absolutely unchallenged.* Mr. Penland wasn't even cross-examined. He came in and told you how this man, Marshall Powell, had run a confidence game on him in Corpus Christi, Tex., and stolen that great amount of money from him, and the facts of that case with the exception of names, brands, times and places, was exactly identical. In substance it was exactly identical to this operation here, up to the point where Daniels was handed the bag, and he knew something was wrong. It was identical. *But the witness Penland was not even challenged* (T.579).

In CHAMBERS.

MR. FOREMAN:

Comes the defendant, Marshall Mays Powell, and moves the Court to declare a mistrial because of the comment by the District Attorney, Joe Hardegree, on the failure of the defendant to testify, to-wit: "I don't blame the attorney for the defendant in claiming that his client is just as entitled to freedom as an officer", and again in the remark "the testimony of the witness Penland is not attacked, it is not disputed", which argument was made by the District Attorney in his opening remark to the jury, and which remarks were immediately called to the attention of the Court at the bench by said attorney for the defendant, and it was agreed by and between said attorney and the Court that

no interruption of the argument would be made, and that the exception should be reserved and preserved by this motion for a mistrial, which is filed immediately at the end of said opening argument by Prosecuting Attorney Joe Hardegree during a recess in order to give us an opportunity to make said motion.

And in support of said motion, the defendant would respectfully show the Court that the defendant, Marshall Mays Powell, exercised his constitutional right to remain silent, and did not (T.585) testify, and said argument made at the close of the evidence suggests in its own language that had the defendant testified, he would have asked for a credence on the part of the jury. This particular portion of the argument, in effect, accentuates, and therefore, "comments" on the fact that the defendant did not testify.

With reference to the second quotation from said argument with reference to the fact that the "testimony of the witness Penland was not attacked", the defendant would respectfully show the Court that the circumstances of the alleged fraudulent taking of $140,000.00 from the witness Penland by the defendant on or about October 5, 1969, at Corpus Christi, Texas, Nueces County, Texas, occurred under such circumstances that only the defendant could have testified contrary to the facts testified about by said witness Penland, and when such, by talk and comment, is made that such testimony was not offered, this, too is a comment on the failure of the defendant to testify, in violation of

this constitutional right under the declaration of Rights of the Constitution of the State of Arkansas, and under the 5th Amendment to the Constitution of the United States.

WHEREFORE, PREMISES CONSIDERED, defendant prays the Court to declare a mistrial to the ends that such damage done to his cause may be amended, and that he may be tried before another and different jury, uninfluenced by such remarks made in said argument by the Prosecuting Attorney in his opening argument to the jury and attorneys for the defendant.

THE COURT:

The motion is overuled (T.586).

MR. FOREMAN:

To which defense excepts (T.587).

JURY FOREMAN:

We have all discussed it, and all of us keep asking this (T.628) question: Why wasn't Powell brought on the stand?

THE COURT:

I am not permitted to answer your question.

* * *

IN CHAMBERS:

MR. KUSIN:

Comes the defendant, M. M. Powell, and moves the Court for a mistrial, and would show to the Court that the jury has inquired as to why the defendant did not take the stand in his own defense. That such statement by a juror shows that the jury is discussing a vital element

of the rights of the defendant, M. M. Powell, in violation of the Constitution of the United States and the State of Arkansas, and in particular, the 5th, 6th and 14th amendments to the Constitution of the United States, and that any instruction by the Court could not remove the harm done to this defendant, and remove from the minds of the jurors these thoughts relative to the defendant not taking the stand.

THE COURT:

In that connection, I would like to inject into the record this statement. The defendant was advised by the Court through the defendant's attorneys, Mr. Percy Foreman, Mr. Sherman Kusin and Mr. Jim Emerson, between the hours of 8:30 A.M. and 9:00 A.M. on the morning of October 30, 1970, the day the case was submitted to the jury, that the Court had prepared, and was willing to (T.632) give an instruction to the jury concerning the defendant's right to testify or his right to decline to testify, and the Court was specifically advised by the defendant's attorneys that they did not want such an instruction given to the jury, and for this reason only was such instruction withdrawn. I will overrule your motion for a mistrial.

MR. KUSIN:

Note our exception (T.633).

MOTION FOR A NEW TRIAL

Now comes Marshall M. Powell, by and through his attorney, Sherman A. Kusin, and moves the Court to grant a new trial on the following grounds:

* * *

XIII

The Court erred in not granting the Defendant's Motion for Mistrial when the Prosecuting Attorney, Joe Hardegree, in objecting to a question asked by the Defendant's counsel, Percy Foreman, stood and objected and stated that the Defendant could testify to that point of evidence if he so desired, said statement by the Prosecuting Attorney being in effect, a comment as to the Defendant taking a stand in his own behalf, said statement by the Prosecuting Attorney being one of such a nature that no (T.649) instruction by the Court could correct the harm done to the Jury, and said statement being in violation of the Fifth, Fourteenth and Sixth Amendments to the Constitution of the United States and of the Constitution of the State of Arkansas, protecting a Defendant's right to remain silent.

XXV

The Court erred in failing to grant Defendant's Motion for a mistrial, duly and timely filed, because members of the jury discussed the failure of the Defendant to take the witness stand and testify in his own behalf. Such discussion by the jury of Defendant's failure to testify was made known to the Court by the jury in the jury room and in the absence of the Defendant. Such discussion violated Defendant's right to keep silent, guaranteed by Amendment V of the Constitution of the United States. A Motion for Mistrial was promptly made by counsel for the Defendant and overruled by the Court.

XXXVII

The Court erred in not granting Defendant's Motion for Mistrial when the Prosecuting Attorney, in his closing argument referred to the credibility of the testimony of the officers and that of the Defendant, said statement by the Prosecuting Attorney being to the credence of the Defendant and said statement was again a comment by the Prosecuting Attorney as to the (T.654) Defendant not taking the stand on his own behalf in violation of the constitutional rights of the Defendant, and any instruction by the Court could not correct the harm done to the Defendant by said statement.

XXXVIII

The Court erred in not granting Defendant's Motion for Mistrial when the Prosecuting Attorney, again, stated in closing that the Defendant had failed to challenge the testimony of the witness, Penland, this being a comment that the Defendant did not testify, said comment by the Prosecuting Attorney being in violation of the constitutional rights of the Defendant and no instruction by the Court could correct the harm done to the Defendant by said comment.

XXXIX

The Court erred in overruling over Defendant's objections and exceptions each and every objection and motion so overruled by the Court. The Defendant has ordered a transcript of the proceedings and the Defendant tenders the transcript of the proceedings in support of this point and requests the Court to consider the transcript and to

reconsider each and every objection and exception made by the Defendant.

XL

The cumulative effect of overruling the motions, objections and exceptions made by the Defendant was such as to deny to the Defendant a fair trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court grant to him a new trial or, in the alternative, that the Court grant him an appeal to the Supreme Court of Arkansas (T.655).

ORDER

On this 21st day of December, 1970, the Defendant, Marshall M. Powell, presents to this Court through his attorneys, Harkness, Friedman & Kusin, his motion for a new trial, which was filed on November 16, 1970, with the Circuit Clerk's office in Polk County, Arkansas * * *

The Court finds that the motion for a new trial should be, and the same is hereby overruled. The Defendant is hereby granted an appeal to the Arkansas Supreme Court, and is given the maximum time within which to lodge his appeal (T.656).